PT 04-2
Tax Type: Property Tax
Issue: Government Ownership/Use

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS

HOUSING AUTHORITY OF THE COUNTY OF DeKALB, ILLINOIS	**Nos:**	**01-PT-0095 (01-19-0009)**
v.	**PIN:**	**08-15-176-021**
ILLINOIS DEPARTMENT OF REVENUE		

RECOMMENDATION FOR DISPOSITION

APPEARANCES: Mr. Brett S. Brown of Smith, Tucker & Brown on behalf of the Housing Authority of the County of DeKalb, Illinois (the "Applicant" or the "Authority"); Mr. Shepard K. Smith, Special Assistant Attorney General, on behalf of the Illinois Department of Revenue (the "Department").

SYNOPSIS: This proceeding raises the limited issue of whether real estate identified by DeKalb County Parcel Index Number 08-15-176-021 (the "subject property") was "used for low income rent housing and related uses," as required by 35 **ILCS** 200/15-95 during the 2001 assessment year. The underlying controversy arises as follows:

The Authority filed an Application for Property Tax Exemption with the DeKalb County Board of Review (the "Board"), which recommended that the subject property be exempt as of May 21, 2001. The Department, however, rejected the Board's

recommendation via a determination, dated November 16, 2001, finding that the subject property is not in exempt use.

Applicant filed a timely appeal to this initial denial and later filed a motion for summary judgment, in which it reserved a right to hearing as to any and all issues decided against its interest. The Department then filed a response to the applicant's motion for summary judgment and the applicant filed a reply.

On April 7, 2003, I issued an order denying applicant's motion for summary judgment as there existed at least one issue of material issue of fact, which rendered it legally inappropriate to grant summary judgment under 735 **ILCS** 5/2-1005(c). Pursuant to the reservation contained in its motion for summary judgment, the applicant then presented evidence at a formal evidentiary hearing, at which the Department also appeared. Following a careful review of the evidence presented at hearing, I recommend that the Department's initial determination in this matter be affirmed.

FINDINGS OF FACT:

1. The Department's jurisdiction over this matter and its position herein are established by the admission of Dept. Ex. Nos. 1, 2.
2. The Department's position in this matter is that the subject property is not in exempt use. Dept. Ex. No. 1.
3. The Authority is a municipal corporation duly organized pursuant to the Housing Authorities Act, 310 **ILCS** 10/1, *et seq*. Its statutory powers include, *inter alia*, authority to provide rental assistance, low rent housing and other related services that

"tend to relieve the shortage of decent, safe, affordable and sanitary dwellings." 310 **ILCS** 10/2.[1] Administrative Notice.

4. The Department exempted property belonging to the Authority pursuant to a determination in Docket Number 89-19-0014. Dept. Ex. No. 2.

5. The subject property is located in DeKalb, IL, away from the main campus of Northern Illinois University ("NIU"), but situated in the midst of fraternity and sorority houses occupied by students attending NIU. Dept. Ex. No. 2; Applicant Motion Group Ex. No. 1.[2]

6. The subject property was improved with an unused and vacant fraternity house at the time applicant purchased it on May 21, 2001. Applicant Motion Group Ex. No. 1.

7. Applicant purchased the subject property with the intention of converting the unused fraternity house into a supportive housing site project for the homeless in DeKalb County. *Id*.

8. Applicant anticipated that the remodeling and renovation needed to complete this project would cost $435,000.00. *Id*.

9. The Authority expected that most of the remodeling and renovation costs would be covered by a $500,000.00 grant issued by the United States Department of Housing and Urban Development ("HUD"). *Id*.; Applicant Ex. No. 3.

10. HUD issued initial approval for this grant in November of 2001. The Authority could not, however, begin to draw on any of the funds from the grant until HUD issued its final approval therefor on June 23, 2003. Applicant Ex. No. 3; Tr. pp. 21, 22-27.

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1. For further information about the Authority's statutory powers, *see*, 310 **ILCS** 10/2, 10/8–10/8.22.

2. Applicant and the Department stipulated that all documents from the summary judgment proceeding be included in the hearing record. Tr. p. 6

11. Applicant could have paid the necessary renovation and repair costs out of its other financial resources, which included a $1,200,000.00 reserve fund, and, also, from its statutory authority to issue bonds. Administrative Notice of 310 **ILCS** 10/11; Tr. pp. 18-19, 37.

12. Applicant elected to forgo the use of its own financial resources and seek to pay the renovation and repair costs from funds that it was to receive from the HUD grant. However, the Authority did not actually use any grant funds to pay these costs during 2001 because HUD would not allow the Authority to use any of the grant funds to reimburse itself for any expenses that the Authority incurred prior to the actual disbursement of the grant proceeds. Tr. pp. 18-19, 37.

13. The Authority's staff nevertheless spent 120 man hours correcting various code violations cited by the City during June of 2001. Applicant Group Ex. No. 1.

14. Applicant's staff also spent between 5 and 8 man hours per week performing routine maintenance and upkeep work on the subject property between June and December of 2001. *Id*.

15. Applicant held a meeting with its architect to discuss the project in April of 2001. It held another meeting with its architect to discuss a timetable for the project and confirm estimated project costs in December of 2001. *Id*.

16. Applicant also held periodic meetings with officials from the City of DeKalb (the "City"), some of whom had initially expressed opposition to the proposed project, throughout 2001. Applicant Ex. No. 4.

17. The City officials did not formally drop their opposition to applicant's proposed project until March 8, 2002. *Id*.

18. Sometime after March of 2002, the Authority abandoned its plans to develop the subject property into a supportive housing site because the City provided the Authority with what it considered to be a more advantageous site for the proposed project. Tr. pp. 35-36.

CONCLUSIONS OF LAW:

Article IX, Section 6 of the Illinois Constitution of 1970 provides as follows:

> The General Assembly by law may exempt from taxation only the property of the State, units of local government and school districts and property used exclusively for agricultural and horticultural societies, and for school, religious, cemetery and charitable purposes.

Pursuant to its Constitutional mandate, the General Assembly enacted Section 15-95 of the Property Tax Code (35 **ILCS** 200/1-1, *et seq*.), which exempts "[a]ll property of housing authorities created under the Housing Authorities Act [310 **ILCS** 10/1, *et seq.*], if the property and improvements are used for low income rent housing and related uses…[.]" 35 **ILCS** 200/15-95.

This provision is unambiguous on its face but contains four distinctive components: first, the preposition "of" connotes an ownership requirement (*see*, Methodist Old People's Home v. Korzen, 39 Ill.2d 149 (1968)); second, the ownership requirement clearly mandates that the property must be owned by a certain type of entity, to wit, "housing authorities created under the Housing Authorities Act [310 **ILCS** 10/1, *et seq.*];" third, the use language establishes that this exemption is based on ownership and use, rather than ownership alone; and fourth, the use language is very restrictive in that it confines application of the exemption to specific types of housing authority

properties, those being the ones used for "low income rent housing and related uses." 35 **ILCS** 200/15-95. *See also*, Krause v. Peoria Housing Authority, 370 Ill. 356 (1939).

Applicant and the Department agree that applicant, a duly constituted housing authority, owned the subject property as of May 21, 2001. Consequently, any exemption applicant obtains herein is limited to a maximum of 62% of the 2001 assessment year by operation of Section 9-185 of the Property Tax Code.[3] Therefore, the true source of controversy in this case is whether the subject property was "used for low income rent housing and related uses," as required by 35 **ILCS** 200/15-95, at any point between May 21, 2001 and the end of the tax year currently in question, December 31, 2001.[4]

The outcome of this controversy depends on the application of three cases, *In re* Application of the County Collector v. Olsen, 48 Ill. App.3d 572 (1st Dist. 1977) ("Olsen"); Weslin Properties v. Department of Revenue, 157 Ill. App. 3d 580 (2nd Dist. 1987) ("Weslin"); and, Lutheran Church of the Good Shepherd of Bourbonnais v. Illinois Department Of Revenue, 316 Ill. App.3d 828, 834 (3rd Dist. 2000) ("Lutheran Church"), to the facts presented herein. Collectively, these cases stand for the proposition that the active adaptation and development of real estate for one or more specifically identifiable exempt purposes can constitute exempt use in certain circumstances. Olsen, *supra*, at 581-582; Weslin, *supra*, at 585-586; Lutheran Church, *supra*, at 833-834.

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3. Section 9-185 of the Property Tax Code, 35 **ILCS** 200/9-185, states, in relevant part that "when a fee simple title or lesser interest in property is purchased, granted, taken or otherwise transferred for a use exempt from taxation under this Code, that property shall be exempt from the date of the right of possession, except that property acquired by condemnation is exempt as of the date the condemnation petition is filed." 35 **ILCS** 200/9-185.

4. Section 1-155 of the Property Tax Code, 35 **ILCS** 200/1-155, defines the term "year" as meaning "a calendar year." 35 **ILCS** 200/1-155. Each such year constitutes a separate cause of action for exemption purposes. People *ex rel*. Tomlin v. Illinois State Bar Ass'n, 89 Ill. App.3d 1005, 1013 (4th Dist. 1980); Jackson Park Yacht Club v. Department of Local Government Affairs, 93 Ill. App.3d 542 (1st Dist. 1981); Fairview Haven v. Department of Revenue, 153 Ill. App.3d 763 (4th Dist. 1987). Therefore,

Whether a given set of circumstances rises to the level of exempt use necessarily depends on the particular facts presented. For instance, in Olsen, the court took judicial notice of "the fact that construction of a major modern expressway [the Dan Ryan expressway], from its initial phases until completion may require a number of years, and that in order to properly plan and carry out this construction it is necessary to acquire the needed land some time in advance." Olsen, *supra*, at 581. Thus, "[s]uch land acquired in advance of actual physical construction, then, simply by virtue of its location and public ownership [by the County of Cook] is in a very real sense 'in the actual process of development and adaptation' for use by the public, and indeed, its eventual use as a completed highway may necessarily depend on its simply being available in an essentially dormant state for a period of time." *Id*. Therefore, evidence that the land was condemned in an appropriate eminent domain proceeding for construction of a massive highway project, "and within a reasonable time, was used as a completed part of that project," justified a finding of exempt use. Olsen, *supra*, at 581-582.

In Weslin, the court found that "the complexity of the architectural process of designing a site for a medical campus, and of designing the buildings to be located thereon," rendered it "virtually impossible to begin construction immediately upon the purchase of the land." Weslin, *supra*, at 586. Thus, "the realities of modern construction practice" dictated a finding of exempt use where applicant: (a) proceeded quickly through the planning and design stages; (b) began the physical process of adaptation by performing some preliminary landscaping and constructing necessary berms; and, (c)

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evidence relating to uses undertaken in years subsequent to 2001 is technically irrelevant to this proceeding.

expended "large" sums of money while undertaking these steps. Weslin, *supra*, at 585-586.

In the Lutheran Church case, applicant acquired property adjacent to its main church facility for purposes of extending its existing yard area. Lutheran Church, *supra*, at 829. Applicant intended to develop the property for use as a playground or picnic area for recreational activities associated with its church. *Id*. It did not, however, plan to make any major structural improvements to the property. *Id*.

The church made very limited use of the subject property throughout the tax year in question. *Id*. at 834. However, the court held that such uses, which consisted entirely of: (a) refraining from planting crops on the property; (b) mowing the grass to remove overgrown weeds; and, (c) tilling the land in preparation for planting grass seed, were sufficient to satisfy the exempt use requirement. *Id*.

In reaching this result, the court relied on Weslin and Olsen, as well as People *ex rel.* Pearsall v. Catholic Bishop, 311 Ill. 11 (1924) ("Pearsall"). The property at issue in Pearsall was a part of a 950 acre Catholic seminary that contained various facilities, including a lake that had been dredged, cleaned and improved with boat-house piers, that seminarians used for recreational purposes. *Id*. at 13, 17.

Also situated on the property were tennis courts, a baseball diamond, some wooded areas that were partially improved with paths and trails and a designated area that the seminary "intended" to use as a golf course for seminarians. *Id*. The court held all these areas, except the one designated for use as a golf course, to be exempt on grounds that they were either actually being used, or, as in the case of the lake area, actually being

adapted and developed for, a use that "would only add to the convenience" of the larger seminary community. Pearsall, *supra*, at 17.

The court denied exemption to the area designated as a golf course on grounds that it "was in its natural state and had never been used as a golf course or for purposes of recreation." *Id*. Thus, the most the seminary had proven about this area was that it intended to use it for seminary-related purposes at some unspecified point in the future. *Id*. Because the mere existence of that intent did not eliminate the necessity for proof that this area was actually used for one or more exempt purposes during the tax year in question, the seminary had failed to prove that the appointed golf course area was in exempt use. *Id*.

In applying Pearsall, as Weslin and Olsen, to the facts before it, the Lutheran Church court found that:

> … the subject property was "undergoing a process of change from the raw or natural state" and was being converted to use as additional church yard or recreation area. Mowing and tilling [during the tax year in question] were part of this process, as was the decision not to plant crops. This activity was more than planning and constituted actual physical use of the property.
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> The Department argues that *Weslin* and [*Olsen*] represent a narrow exception to the "actual use" requirement that applies only where extensive planning, preparation or construction is required to put property into actual use for tax exempt purposes. No such planning or construction was required to convert the subject property to recreational use.
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> We agree that, unlike *Weslin* and [*Olsen*], no extensive planning or construction was necessary in this case. However, "each individual claim for exemption must be determined from the facts presented." [Citations omitted].

> The Church's efforts at development and adaptation of the subject property must be judged in light of the ultimate intended use. Viewed in that manner, the Church's activities - refraining from planting crops and mowing and tilling the land in preparation for planting grass seed – were *more* extensive than those in *Weslin* and [*Olsen*] in that the Church more nearly approached completion.
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> Accordingly, based on *Pearsall*, *Weslin* and [*Olsen*], we find that the Church presented sufficient evidence that the subject property was in the process of development and adaptation for exempt use to qualify as tax exempt.

Lutheran Church, *supra*, at 833-834.

Here, the Authority argues that its actual uses of the subject property during the period under review, which consisted entirely of repairing a series of building code violations and undertaking weekly maintenance and upkeep of the subject property, are sufficient to constitute exempt use under the above-cited cases. The Department counters that applicant's inability to procure necessary HUD funding throughout the period under review, coupled with uncertainty as to whether applicant would eventually succeed in overcoming the objections of those who opposed its proposed use of the subject property, create inappropriate speculation as to when, if ever, the subject property will actually be "used for low income rent housing and related uses," as required by Section 15-95 of the Property Tax Code.

Applicant is technically correct in arguing that none of the cases cited above establish a blackletter rule requiring it to obtain and/or maintain an appropriate level of financing before it receives a finding of exempt use. However, the Weslin court specifically based its finding of exempt use, in part, on evidence that the applicant therein had expended "large" sums of money while engaging in the initial phases of its project. Weslin, *supra*, at 585-586.

The exact amount of these "large" sums was unspecified in the court's opinion. However, it is clear that one of "the realities of modern construction practice" that concerned the Weslin court was ensuring that complicated development projects remain financially viable. As such, it is neither novel nor contrary to law to require an applicant undertaking such a complex project to submit appropriate evidence demonstrating that it first obtained, and then maintained, sufficient financial resources to bring its plans into fruition.[5]

The financial viability of the applicant's project remained questionable at best during the period currently in question. Applicant did make some repairs to the subject property in June of 2001. However, the extent of these repairs seems quite limited because applicant did not receive disbursement from the $500,000.00 HUD grant, which was to fund 87%[6] of the remodeling and renovation costs that applicant needed to incur in order to complete the project. Moreover, the Authority was unable to make any repairs beyond those it made in June of 2001 precisely because it did not receive this disbursement. Therefore, it does not appear that applicant had sufficient financial resources to bring its project into fruition during the period under review.

More importantly, this record contains no evidence proving what sums of money applicant spent on its repair and maintenance operations throughout the period under review. Nor does the record contain any evidence establishing the amount of any expenditures applicant made in furtherance of other aspects of its project, such as the

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5. The Lutheran Church court did not make any reference to financial considerations. However, the project under consideration in that case was, by the court's admission, far less complex that the ones at issue in Weslin or Olsen. Lutheran Church, *supra*, at 834. Thus, the limited facts presented in Lutheran Church did not require the court to analyze the financial viability of applicant's project.

6. $435,000.00/$500,000.00 = .87 or 87%.

amount of any fees it paid to its architect. Absent this evidence, I am unable to determine whether applicant's plan was financially viable throughout the relevant period. Therefore, applicant, which bears the burden of proving all elements of its exemption claim by clear and convincing evidence, (People Ex Rel. Nordland v. the Association of the Winnebego Home for the Aged, 40 Ill.2d 91 (1968); Gas Research Institute v. Department of Revenue, 154 Ill. App.3d 430 (1st Dist. 1987)), has failed to sustain a critical aspect of that burden.

Counsel for the Department also argues that applicant was not in exempt use during the period under review because applicant failed to clearly and convincingly demonstrate that the subject property would eventually be used for its intended purpose, a low income housing project. Once again, counsel for the applicant is technically correct in responding that nothing in the Weslin, Olsen or Lutheran Church opinions expressly requires applicant to prove that its course of adaptation and development will unequivocally place the property in exempt use on any particular date certain. Nonetheless, public policy dictates that public taxing bodies not bear the lost revenue costs attributable to property tax exemptions unless and until applicant provides some reasonable assurance that the property in question will in fact be used for exempt purposes.

None of the facts in Olsen, Weslin, Pearsall and Lutheran Church suggest that the projects at issue in those cases were delayed by such a political impasse as existed in this matter. Moreover, the delay at issue in Olsen was one the court found to be inherent in the process of building a major expressway, and therefore, required that the property be

"available in an essentially dormant state for a period of time" before the process of physical development began in earnest. Olsen, *supra*, at 581-582.

By contrast, the development of a low income housing project is an inherently active process. Consequently, property acquired for such a project certainly need not lay in a "dormant" state for any period of time before the process of physical development can begin. As such, the case is distinguishable from both Olsen and Mount Calvary Baptist Church v. Zehnder, 302 Ill. App.3d 661 (1st Dist. 1999), which applicant cites to support its argument that it need not provide some sort of reasonable assurance of exempt use.

The property at issue in Mount Calvary was a large church complex that had been actively and continuously used for various religious purposes (prayer services, Bible studies, etc.) before most of it sustained severe structural damage in a fire. Mount Calvary, *supra*, at 663-664. This damage rendered much of the actual church facility unsuitable for its previous use. The court placed great emphasis on the fact that the "property was the site of an existing church facility, which but for the 1989 fire, presumably would have continued to be used, as it had been for years, as a place of worship." *Id*. at 669. Therefore, the court concluded that "where a property is devoted to a religious purpose as the site of a place of worship, and has been so devoted for numerous years, an incidental interruption of its actual use for that religious purpose due to fire will not destroy the exemption." *Id*. at 670.

The property at issue in this case was an unused fraternity house for students attending NIU before applicant bought it. It is therefore clear that this property was *not* used for "low income rent housing and related uses," as required by Section 15-95 of the

Property Tax Code, prior to May, 2001. Hence, this case is quite different from Mount Calvary in that the lack of exempt use herein is not attributable to any type of "interruption" in a *pre-existing* exempt use.

Moreover, although the court in Mount Calvary did address certain Weslin-related development issues, it did so in the context of Mount Calvary's attempt to rebuild from its casualty losses. Mount Calvary, *sup*ra, at 670. As such, the court found that the steps applicant took, which consisted of establishing a building fund dedicated to the rebuilding effort and maintaining appropriate legal proceedings relating to the distribution of insurance proceeds, were sufficient to warrant exemption under Weslin. *Id*.

The context of this case is far different from that in Mount Calvary because the project at issue is not one precipitated by the occurrence of a single, catastrophic event that happened outside the regular course of applicant's business. Rather, it is one that applicant undertook in the normal course of its business as a duly constituted housing authority. Consequently, determining whether the efforts applicant undertook in furtherance of its proposed project rose to the level of active "adaptation and development" required under Weslin necessarily requires evaluating the business realities that housing authorities confront in planning and developing low income housing projects.

One of those business realities is that a housing authority must first obtain, and then maintain, a level of financing that is sufficient to bring the proposed development into fruition. Another is that the housing authority must successfully overcome whatever political or other objections that those opposed to its developments might make.

This record fails to clearly and convincingly prove that applicant was successful in negotiating either of these business realities throughout the period currently under review. Accordingly, prospects for making an appropriate level of progress toward the adaptation and development of its project remained speculative throughout that period. In fact, the project never became a reality on the subject property as a result of a political agreement placing it at another location.

Based on the above, I conclude that the subject property was not "used for low income rent housing and related uses," as required by 35 **ILCS** 200/15-95, at any point during the period currently under review. Therefore, the Department's initial determination in this matter, denying the subject property exemption from real estate taxation for this period, should be affirmed.

WHEREFORE, for all the foregoing reasons, I recommend that real estate identified by DeKalb County Parcel Index Number 08-15-176-021 not be exempt from 2001 real estate taxes.

Date: 1/15/2004

Alan I. Marcus
Administrative Law Judge